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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 319

ROBERT K. MOOKINI AND LEE SAU CHONG,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the trial court. The opinion of the Circuit Court of Appeals (R. 1016–1021) is reported in 92 F. (2d) 126.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 26, 1937 (R. 1021). The petition for writ of certiorari was filed August 16, 1937, and granted October 18, 1937 (R. 1024). The jurisdiction of this Court is invoked under Section 240 (a)

of the Judicial Code as amended by Act of February 13, 1925.[1]

QUESTION PRESENTED

Whether the Criminal Appeals Rules of May 7, 1934, apply to an appeal taken by defendants in a criminal case from the District Court in the Territory of Hawaii to the Circuit Court of Appeals for the Ninth Circuit.

STATUTES AND RULES INVOLVED

The pertinent statutes and rules involved are copied in the Appendix, *infra*, pp. 27–33.

STATEMENT

Petitioners were jointly indicted in the District Court for the Territory of Hawaii in two counts charging violation of Section 35 of the Criminal Code (U. S. C., Title 18, Sec. 80) by presenting fraudulent claims (R. 5–11). They were tried together (R. 64), and on May 28, 1935, the jury found Mookini guilty on one count and Chong guilty on both (R. 80). They filed separate motions for new trials on June 7, 1935 (R. 81, 92), which were heard together and denied on June 19, 1935 (R. 78–79). Petitioners were sentenced on June 29, 1935 (R. 79–80). They orally noted an appeal immediately (R. 80, 104, 110), but filed no written appeal papers until September 27, 1935. They then filed a "notice

[1] As the petition for writ of certiorari was filed with this Court within thirty days after entry of judgment by the Circuit Court of Appeals, it was in time under the Criminal Appeals Rules promulgated by this Court May 7, 1934. (See Rule XI, Criminal Appeals Rules.)

of appeal" (R. 113–114) and on the same day filed a document which was entitled "petition for appeal," but which did not specifically pray for the allowance of an appeal (R. 114–115). An order of the District Court, dated the same day, recited that "The foregoing appeal is allowed" (R. 115). Also, on September 27, 1937, citation on appeal was issued and served on counsel for the Government (R. 127–128).

The appeal was obviously not taken within the five-day period prescribed by Rule III of the Criminal Appeal Rules promulgated by this Court on May 7, 1934 (*infra*, p. 29). Moreover, the Circuit Court of Appeals, having treated the appeal as having been taken to that court on petition for appeal, stated that the appeal also was not taken in the manner specified in Rule III (R. 1017).[2] The appeal was, however, taken within the three-month period prescribed by Section 8 (c) of the Act of February 13, 1925 (*infra*, p. 30).[3]

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[2] Rule III (*infra*, p. 29) abolishes petitions for allowance of appeal and citations in cases covered by the Rules, and substitutes a notice of appeal, a copy of which is required to be served on the United States Attorney.

[3] We deem it unnecessary here to make any point as to the sufficiency of the "petition for appeal" to meet the requirements of Section 8 (c) of the Act of February 13, 1925, if that statute, rather than Rule III of the Criminal Appeals Rules, governs. We assume that the case will be remanded to the Circuit Court of Appeals, if Section 8 (c) applies, for the consideration of questions on the merits not passed upon by that court, and the point is one which should be made, if it has any merit, in the Circuit Court of Appeals.

In neither the original brief for the petitioners nor that of the Government in the Circuit Court of Appeals was there any question presented as to whether the Criminal Appeals Rules are or are not applicable to the District Court for the Territory of Hawaii. From a supplemental brief filed by the Government in the Circuit Court of Appeals (p. 1), it appears, however, that on oral argument that court, on May 24, 1937, raised this question itself, and that counsel were requested to file further briefs. (See R. 1015.)

In its supplemental brief, the Government advised the Circuit Court of Appeals as follows (pp. 4, 8–9):

> Before proceeding to discuss the applicability of the rules it should be stated that this office has been advised by the Attorney General that the rules are in his opinion inapplicable, and that the District Court of Hawaii and the United States Attorney for the District of Hawaii are so advised.
>
> * * * * *
>
> If the intent of the Supreme Court may be ascertained from the history of the enactment of the rules, it seems that they were originally drafted and submitted to the Chief Justice with intention that the District Court of Hawaii be excepted from their operation.
>
> On May 26, 1933, the Attorney General of the United States upon the request of the Chief Justice presented a draft of proposed rules governing practice and procedure in

criminal cases. This draft in part forms the basis of the rules adopted by the Supreme Court. This draft, in designating the courts to be affected uses the identical language of the rules, i. e. "District Courts of the United States."

The Attorney General in a statement accompanying the draft states:

"The Rules are limited in their application to proceedings in cases instituted in the District Courts of the United States and in the Supreme Court of the District of Columbia. There is not sufficient data at hand upon which to predicate proposals at this time relative to practice and procedure in cases instituted in the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, or in the Supreme Courts of Hawaii and Puerto Rico, or in the United States Court for China. It is thought that it would be the part of wisdom to establish the rules for practice and procedure for Continental United States before attempting to provide for the Territories, Insular Possessions and Consular Courts, as these situations will undoubtedly require special treatment because of local conditions and the distance separating the trial court from the Appellate Court."[4]

* * * * *

[4] Comparison of this statement with that contained in the draft of the proposed rules transmitted to the Chief Justice by the Attorney General (published by the Government Printing Office, 1933) shows that the statement is accurate.

> Assuming that the intent expressed by the Attorney General was adopted with his language it is clear that the intention was to exclude the District Court of Hawaii from the operation of the rules.

However, the Circuit Court of Appeals held that the Criminal Appeals Rules apply to appeals taken from the District Court of Hawaii by virtue of the Organic Act, and dismissed the appeal on the sole ground that under such rules (R. 1020):

> The time within which appellants might have taken a valid appeal expired on July 6, 1935. This appeal, which they attempted to take on September 27, 1935, must be dismissed.

In dismissing the appeal the court below did not mention or pass upon any of the questions presented by the petitioners' assignment of errors (R. 116–127).

In their petition for writ of certiorari filed in this Court the petitioners referred only to the ruling of the Circuit Court of Appeals in dismissing, without reviewing the merits, their appeal as not taken in time (pp. 1–3). However, in their brief in support of the petition for writ of certiorari the petitioners argued not only that the Circuit Court of Appeals erred in dismissing the appeal but pre-

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The Government's supplemental brief omitted, however, the following additional paragraph which was contained in the Attorney General's statement:

"A few letters received from Judges in Hawaii and Alaska will be found in the files."

sented arguments based on alleged errors of the trial court which were not reviewed by the Circuit Court of Appeals (Br. 8–10). The Government did not oppose the petition for writ of certiorari but suggested that review be limited to the question whether the Criminal Appeals Rules are applicable to criminal cases in the District Court for the Territory of Hawaii. While this Court in granting the petition did not incorporate in its order the limitation suggested by the Government, this was probably unnecessary, as the only question passed upon by the Circuit Court of Appeals was the question of the applicability of the Criminal Appeals Rules to the District Court of Hawaii. We therefore assume that this is the only question which will be considered by this Court and that, if this Court should conclude that the Circuit Court of Appeals was in error in its holding, it will remand the case to that court for consideration of the appeal on its merits. The Government in this brief consequently confines its discussion to the question of the applicability of the Criminal Appeals Rules to the District Court for Hawaii.

SUMMARY OF ARGUMENT

1. It is our view that the only reasonable construction which can be given the Act of February 24, 1933, as amended, is that it so amended and modified the Hawaiian Organic Act as to permit this Court, after the enactment of the former stat-

ute, to prescribe a different system of rules governing the appellate procedure in criminal cases in the District Court for Hawaii from that applying to District Courts in continental United States. Until action by this Court the existing system of statutory regulations governing appellate procedure in such cases in the District Court for Hawaii remained in effect. Unless, therefore, this Court, in promulgating its Criminal Appeals Rules of May 7, 1934, indicated the intention that those rules should apply to the District Court for Hawaii, the court below was in error in dismissing the petitioner's appeal as not having been taken within the time prescribed in the Criminal Appeals Rules.

2. That this Court did not intend that the Criminal Appeals Rules should apply to the District Court for Hawaii is clear from the Rules themselves and its order of May 7, 1934, promulgating them, together with other circumstances.

3. While we are of the view that the court below erred in dismissing the petitioners' appeal upon the ground that the Criminal Appeals Rules of May 7, 1934, apply to the District Court for Hawaii, we do not formally confess error out of deference to the views of that court, but submit the case for decision by this Court.

As the court below, in dismissing the petitioners' appeal, did not pass upon the merits of such appeal, we respectfully submit that this Court should remand the case to the court below for further dis-

position if it agrees with the Government's view that the Criminal Appeals Rules do not apply to the District Court for Hawaii.

ARGUMENT

I.

THE ACT OF FEBRUARY 24, 1933, AS AMENDED, SO AMENDED THE HAWAIIAN ORGANIC ACT AS TO PERMIT THIS COURT TO PRESCRIBE A DIFFERENT SYSTEM OF RULES FOR APPEALS FROM CONVICTIONS IN CRIMINAL CASES IN THE DISTRICT COURT FOR HAWAII FROM THAT APPLYING TO APPEALS FROM DISTRICT COURTS IN CONTINENTAL UNITED STATES. UNTIL ACTION BY THIS COURT THE EXISTING SYSTEM OF STATUTORY REGULATIONS GOVERNING APPELLATE PROCEDURE IN SUCH CASES IN THE DISTRICT COURT OF HAWAII REMAINED IN EFFECT

While we are of the opinion that the Circuit Court of Appeals erred in holding that the Criminal Appeals Rules apply to appeals taken from the District Court for Hawaii, and therefore should not have dismissed the petitioners' appeal for that reason, we do not formally confess error out of deference to the views of the Circuit Court of Appeals.

The holding of the court below was based upon the view that when this Court, by its order of May 7, 1934 (*infra,* p. 28), provided that the Criminal Appeals Rules should "be adopted as the Rules of Practice and Procedure in all proceedings" subsequent to determination of guilt "in criminal cases in District Courts of the United States * * * and in all subsequent proceedings in such cases in the United States Circuit Courts of Appeal," those

rules automatically applied to the District Court for Hawaii by virtue of the provision of the Organic Act (*infra*, pp. 32–33) that "Appeals from the said district court shall be had and allowed to the circuit court of appeals for the ninth judicial circuit in the same manner [5] as appeals are allowed from district courts [6] to circuit courts of appeal as provided by law." The court below consequently held that, as the Criminal Appeals Rules required (Rule III, *infra*, p. 29) that an appeal must be taken within five days after entry of judgment of conviction or order denying a motion for a new trial, the appeal in the instant case must be dismissed because not taken within the period prescribed by such rule.

Utilizing the same reasoning, the Circuit Court of Appeals would have been required to hold that even if this Court, in prescribing the Criminal Appeals Rules, had specifically declared that they did not apply to the District Court for Hawaii, they would, nevertheless, have had such application under the Organic Act because they governed the procedure on appeal from District Courts of the United States to Circuit Courts of Appeals.

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[5] In line with the decision of the Circuit Court of Appeals, we assume that the term "manner," as used in the Hawaiian Organic Act, is broad enough to include not only the method of taking the appeal but also the time limitation upon the taking of the appeal.

[6] Congress was here clearly referring to District Courts of the United States. Cf. section of Hawaiian Organic Act contained in U. S. C., Title 48, Sec. 642, *infra*, p. 31.

The fundamental error of the court below lies, we submit, in its misconception of the purpose and intent of the Act of February 24, 1933, as amended (*infra*, p. 27), pursuant to which the Criminal Appeals Rules were prescribed, and the consequent effect of that statute upon the provision of the Hawaiian Organic Act upon which the court below relies.

Under the statutory system existing at the time of the passage of the Act empowering this Court to prescribe rules of appellate practice and procedure in criminal cases, an appeal to the Circuit Court of Appeals was required to be taken in any case, civil or criminal, by a petition for appeal[7] filed within three months after the entry of judgment or decree. See Section 8 (c), Act of February 13, 1925 (*infra*, p. 30). As this section covered appeals both from the District Courts of the United States and from the District Court of Hawaii (see Section 128 (a), second, Judicial Code, as amended by the Act of February 13, 1925, *infra*, p. 30), it was in harmony with the provision of the Hawaiian Organic Act that appeals from the District Court of Hawaii "shall be had and allowed to the circuit court of appeals for the ninth judicial circuit in the same manner as appeals are allowed from district courts to circuit courts of appeal as provided by law."

[7] Allowance of the petition was required. See *Alaska Packers* v. *Pillsbury*, 301 U. S. 174.

The Act of February 24, 1933, as amended, it is our contention, so modified and amended the Hawaiian Organic Act as to permit this Court, in its discretion, to prescribe a set of rules covering the practice on appeals from convictions in the District Court of Hawaii which differed from that adopted for District Courts of the United States.

In Section 1 of the Act (*infra*, p. 27), it was provided that this Court "*shall have power to prescribe, from time to time,* rules of practice and procedure with respect to *any or all proceedings*" after determination of guilt, "in criminal cases in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, in the Supreme Courts of the District of Columbia, Hawaii, and Puerto Rico, in the United States Court for China, in the United States Circuit Courts of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States." In Section 2 it was provided that "the rules made as herein authorized *may* prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed." And in Section 3 it was provided that this Court "*may* fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in con-

flict therewith shall be of no further force." [Italics ours.]

The highly permissive and wholly discretionary character of the rule-making power conferred upon this Court is apparent. This Court "shall have power" to prescribe rules. This clearly is the power to make or not to make rules, as this Court may deem advisable.

Rules may be prescribed "from time to time." This language obviously means that the Court may prescribe a portion of the rules at one time and another portion at another time. It expresses the power to cumulate rules and is inconsistent with the idea that this Court is permitted to prescribe only a single set of rules. The language was not needed to confer the power of amendment, for, of course, the power to make rules includes the power to amend them.

As a further indication of the wide discretion conferred upon this Court, the Act provided that the rule-making power could extend "to any or all proceedings" after determination of guilt.

Similarly unfettered was the discretion reposed in this Court to determine the particular courts to which it would apply the rules which it might adopt from time to time. This Court was permitted to adopt rules regulating the procedure and practice, after determination of guilt, "in criminal cases *in* district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico,

Canal Zone, and Virgin Islands, *in* the Supreme Courts of the District of Columbia, Hawaii, and Puerto Rico, *in* the United States Court for China, *in* the United States Circuit Courts of Appeals, *in* the Court of Appeals of the District of Columbia, and *in* the Supreme Court of the United States." [Italics ours.] Certainly, it would be difficult to contend that, upon the basis of the language employed, this Court was required to prescribe the same rules for District Courts in continental United States that it prescribed for the United States Court for China or for the Supreme Courts of the District of Columbia, Hawaii, or Puerto Rico, or any of them. It cannot be doubted that Congress intended that this Court should be permitted to adopt the same or different rules for these courts as it saw fit, depending upon what this Court's study of the conditions applicable to courts different in character from District Courts in continental United States should dictate.

The language employed in conferring upon this Court power to make rules for the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands is, it is true, different from that utilized in the succeeding clauses in connection with the other courts to which we have referred. But there is certainly nothing in this language which requires the conclusion that this Court was empowered only to adopt identical rules for the District Courts in continental United States and the

territorial and insular District Courts.[8] The language employed by Congress is that this Court shall have power to adopt rules in criminal cases "in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands." This language is susceptible of several interpretations, none of which is favorable to the view that the same rules must be adopted for all of the courts enumerated. One is that in adopting rules for District Courts in continental United States, this Court was empowered, within its discretion, to include or not to include the territorial and insular District Courts. If it did not include them in rules adopted for the District Courts in continental United States, obviously the existing statutory system regulating the procedure on appeals from convictions in criminal cases in the territorial and insular District Courts would remain in effect until this Court determined to include these courts within the purview of the rules prescribed for District Courts in continental United States. While this would, so far as the District Court for Hawaii is concerned, constitute an amendment or modification of the Hawaiian Organic Act to the extent that it would permit this Court to sanction for the District Court of Hawaii a different system of regulation of appellate pro-

[8] Neither the committee reports nor the debates throw any light on the question here involved. See Sen. Rpt. No. 627, 72d Cong., 1st sess.; H. Rpt. No. 2047, 72d Cong., 2d sess.; Sen. Rpt. No. 257, H. Rpt. No. 858, 73d Cong., 2d sess.

cedure from what it applied to District Courts in continental United States, there is another construction of the language employed which, we believe, is more in harmony with the manifest purpose of the statute considered as a whole.

That construction is that Congress intended by the language employed merely to make certain that this Court was empowered to prescribe such rules of practice as it deemed advisable not only for District Courts in continental United States but also for the territorial and insular District Courts. If Congress had merely used the term "district courts of the United States", the question would have arisen as to whether Congress intended to empower this Court also to make rules for the territorial and insular District Courts. It was, apparently, to forestall any such question that Congress used the language "district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands." This may be illustrated by particular reference to the District Court of Hawaii. While the Organic Act of Hawaii (*infra,* p. 31) provides that the District Court for that territory "shall have the jurisdiction of district courts of the United States," it had been settled long prior to the legislation empowering this Court to prescribe rules for criminal appeals that such a grant of power did not make a territorial court a "District Court of the United States."

As was said by this Court in *United States* v. *Burroughs,* 289 U. S. 159, 163, in speaking of a similar provision as to the Supreme Court of the District of Columbia in the local Code:

> * * * Where a statute uses this or similar language to define the jurisdiction of a court, such a court is authorized to try statutory actions declared to be cognizable by district courts, as if the tribunal were in fact a district court of the United States. And the same rule is applicable to appellate proceedings. Compare *In re Cooper,* 143 U. S. 472, 494; *Hine* v. *Morse,* 218 U. S. 493; *Federal Trade Commission* v. *Klesner,* 274 U. S. 145, 154; *United States* v. *California Cooperative Canneries,* 279 U. S. 553, 558. But vesting a court with "the same jurisdiction as is vested in district courts" does not make it a district court of the United States. This has been repeatedly said with reference to territorial courts. *Reynolds* v. *United States,* 98 U. S. 145, 154; *Stephens* v. *Cherokee Nation, supra* [179 U. S. 445], p. 476; *Summers* v. *United States,* 231 U. S. 92, 101.[9]

[9] This case is of added significance because this Court, while holding that the Supreme Court of the District of Columbia was not a "District Court of the United States" within the meaning of the Criminal Appeals Act, decided in a later case at the same term that it was a constitutional court of the United States within the meaning of Article III of the Constitution, and that, therefore, the salaries of its judges could not be diminished by Congress during their continuance in office *O'Donoghue* v. *United States,* 289 U. S. 516.

See also to the same effect the views of the Advisory Committee appointed by this Court to submit a draft of proposed rules of civil procedure quoted at page 21, *infra*.[10]

A third explanation of the language utilized, which lends no support to the view that this Court was required to prescribe the same rules for the territorial and insular District Courts as it adopted for District Courts in continental United States, is that Congress merely, for convenience, enumerated the courts in accordance with their similarity in name and without reference to their similarity in other respects. We thus find that Congress placed in one group all of the Supreme Courts, the Supreme Courts of the District of Columbia, Hawaii, and Puerto Rico, even though the Supreme Court of the District of Columbia [now called the District Court of the United States for the District of Columbia [11]] was primarily a trial court,[12] while

[10] The fact that the District Court of Hawaii has styled itself the "United States District Court for the Territory of Hawaii" (R. 5) or that that court was sometimes referred to in statutes antedating the enactment of the Act of February 24, 1933, as amended, as a "United States district court" (Sec. 128 (a), Judicial Code, as amended by the Act of Feb. 13, 1925, *infra*, p. 30) obviously has no greater weight in making the District Court for Hawaii a "District Court of the United States" than does the provision in the Organic Act quoted above.

[11] Act of June 25, 1936, c. 804, 49 Stat. 1921.

[12] The Code of the District of Columbia, March 4, 1929. Title 18, Secs. 43, 44.

the Supreme Courts of Hawaii and Puerto Rico are appellate courts.[13] Similarly, Congress placed in another group all courts bearing the title "District Courts," even though they were created under different provisions of the Constitution, the District Courts of the United States being created pursuant to the authority conferred upon Congress by Article III and the territorial and insular District Courts being created pursuant to the power vested in Congress by Article IV, Section 3, clause 2, or by virtue of the general right of sovereignty existing in the Government. *O'Donoghue* v. *United States,* 289 U. S. 516, *supra.*

Considering the statute as a whole, it is evident, we believe, that Congress intended that the complete regulation of the practice and procedure in criminal cases in the Federal, territorial, and insular courts, after determination of guilt, should be confided to the discretion of this Court. So far as the territorial and insular District Courts are concerned, the statute, fairly interpreted, reposed in this Court the discretion to determine whether it would apply to all or any of those courts rules which it adopted for the District Courts in continental United States, whether it would prescribe separate and different rules for all or any of these

[13] Revised Laws of Hawaii (1935), Sec. 3593; Act of Porto Rico of March 12, 1903, Sec. 1, contained in Code of Civil Procedure of Puerto Rico, 1933 ed., p. 293, and in Compilation of Revised Statutes and Codes of Porto Rico on March 9, 1911, Sec. 1141. See also Code of Criminal Procedure (1935), Sec. 345.

courts, or whether it would leave in force the existing statutory regulations as to any or all of such courts. It thus followed, we submit, that the Hawaii Organic Act was amended or modified by the Act of February 24, 1933, as amended, to the extent that, after enactment of the latter statute, this Court was permitted to prescribe a different system of appellate procedure for the District Courts in continental United States from that applying to the District Court for Hawaii.

Until action is taken by this Court specifically prescribing rules of appellate procedure and practice for cases in the District Court of Hawaii and the other territorial and insular District Courts, it is obvious that the existing statutory system remains in effect. While the grant of power to make rules conferred upon this Court by the Act of 1933, as amended, was one *in praesenti,* it was, of course, not susceptible of immediate exercise. Study was required of the evils resulting from the old system, with a view to devising appropriate remedies. In determining what rules should be adopted for the courts outside of continental United States, or whether the existing system should be maintained, consideration was, of course, required to be given to local conditions and the distance separating those courts from the appellate courts in this country. Unless, therefore, this Court, in promulgating its Criminal Appeals Rules of May 7, 1934, indicated

the intention that those rules should apply to the District Court for Hawaii, the petitioners had three months under the existing statute (*infra,* p. 30) within which to appeal to the Circuit Court of Appeals for the Ninth Circuit and that court was therefore in error in holding that the appeal should be dismissed because not taken within the time prescribed by the Criminal Appeals Rules.

There is nothing in the views of the Advisory Committee appointed by this Court to submit a draft of proposed rules of civil procedure which is essentially in conflict with our interpretation of the Act of February 24, 1933, as amended, authorizing this Court to prescribe rules of criminal practice and procedure. In its report of April 1937, that Committee, by an interpretative note to Rule 1, which defined the scope of the proposed rules of civil procedure as governing "the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity," said (Note 2):

> 2. The expression "districts courts of the United States" appearing in the statute authorizing the Supreme Court of the United States to promulgate rules of civil procedure does not include the district courts held in the territories and insular possessions. The rules, however, by virtue of the organic acts of the territories and insular possessions will

apply to the district courts of Hawaii and Puerto Rico, but will not apply to the district courts of Alaska, the Virgin Islands, and the Canal Zone. Hawaii: U. S. C., Title 48, § 642 (Jurisdiction of district courts; authority of officers); § 645 (Appeals). Puerto Rico: U. S. C., Title 48, § 863 (District of Puerto Rico; Officers; jurisdiction; vacancies); § 864 (Appeals; removal of causes; certiorari; terms of district court; use of English language); § 865 (Appeals); § 867 (juries in district court; qualifications). Alaska: U. S. C., Title 48, § 23 (Constitution and laws of the United States extended); see § 90 (Laws submitted to Congress); see also the complete code of civil procedure enacted under these statutes, Alaska Compiled Laws (1933) tit. 3. The Virgin Islands: U. S. C., Title 48, § 1392 (Local laws continued; courts; appeals); see also § 1405z (Judicial branch; divisions of district court; terms; rules of practice; process). The Canal Zone: U. S. C., Title 48, § 1344 (District Court generally; rules of practice).

It will be noted, however, that the statute authorizing this Court to promulgate rules of civil procedure (Act June 19, 1934, c. 651, 48 Stat. 1064; U. S. C., Title 28, Sec. 723b, 723c), provided merely that this Court "shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process," etc. Without discussing the correctness of the Advisory

Committee's conclusion as to the applicability of the proposed rules of civil procedure to the District Court of Hawaii, it suffices to say that there is not in the Act authorizing this Court to prescribe rules of civil procedure any such affirmative language indicating the intention of Congress to permit the adoption of different rules of procedure for the District Courts in continental United States and for the District Court of Hawaii as appears in the statute empowering this Court to adopt rules of criminal practice and procedure.

If our construction of the Act of February 24, 1933, as amended, is correct, the only remaining question is whether this Court intended that its Criminal Appeals Rules of May 7, 1934, should apply to the District Court for Hawaii.

II

THE CRIMINAL APPEALS RULES AND ORDER OF THIS COURT OF MAY 7, 1934, PROMULGATING THEM, TOGETHER WITH OTHER CIRCUMSTANCES, INDICATE CLEARLY THAT THIS COURT DID NOT INTEND THAT THOSE RULES SHOULD APPLY TO THE DISTRICT COURT FOR HAWAII

It would seem unnecessary to discuss at any length the proposition that this Court did not intend that the Criminal Appeals Rules promulgated May 7, 1934, should apply to the District Court for Hawaii, as this was apparently not disputed by the court below, the decision of that court being based solely upon the ground that the Rules became applicable solely by virtue of the provision of the Hawaiian Organic Act previously discussed.

That it was not the intention of this Court that the Criminal Appeals Rules should apply to the District Court for Hawaii is clear.

The Criminal Appeals Rules themselves disclose that they were intended to apply only to District Courts in continental United States. Rule XIII (*infra*, p. 30) provides that "For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or *under the law of the State where the case was brought*) shall be excluded." [Italics ours.]

Also, while the Act of February 24, 1933, as amended (*infra*, p. 27) permitted this Court to prescribe rules for the "district courts of the United States, including the District Courts of Alaska, Hawaii," etc., the Court's order promulgating the rules (*infra*, p. 28) adopted them only for the "District Courts of the United States."[14] In addition to the fact that this Court was well aware at the time it adopted the Criminal Appeals Rules that the territorial and insular District Courts were not "District Courts of the United States" (see discussion on p. 16–18, *supra*), there can be no doubt, if our interpretation of the statute is correct, that by using merely the term "District Courts of the United States" in its order promulgating the rules, the Court intended to eliminate from the application of the rules the District Court of Hawaii.

[14] See also Paragraph 1 of Rule XIII, *infra*, p. 29.

In addition, it may be pointed out that, as was stated in the supplemental brief filed by the Government in the court below (*supra*, pp. 4–6), the Attorney General, in submitting, at the request of this Court a draft of proposed rules on May 26, 1933, specifically indicated that the suggested rules were confined in their application to "District Courts of the United States" and "the Supreme Court of the District of Columbia," i. e. courts in continental United States for the reasons that:

> There is not sufficient data at hand upon which to predicate proposals at this time relative to practice and procedure in cases instituted in the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, or in the Supreme Courts of Hawaii and Puerto Rico; or in the United States Court for China. It is thought that it would be the part of wisdom to establish the rules for practice and procedure for Continental United States before attempting to provide for the Territories, Insular Possessions, and Consular Courts, as these situations will undoubtedly require special treatment because of local conditions and the distance separating the trial court from the Appellate Court.
>
> A few letters received from Judges in Alaska will be found in the files.

Presumably this Court in promulgating its rules, using the same phrase "District Courts of the United States," had these considerations in mind and consequently intended by the language utilized in its order to limit their application to courts in

continental United States. Upon the understanding that the rules promulgated did not apply to the District Court for Hawaii, the Attorney General advised the District Judges for that court and the United States Attorney for the Territory to that effect.

CONCLUSION

While we are of the opinion that the court below erred in dismissing the petitioners' appeal upon the ground that the Criminal Appeals Rules of May 7, 1934, apply to the District Court of Hawaii, we do not formally confess error out of deference to the views of that court but submit the case for decision by this Court.

If this Court should decide that the Circuit Court of Appeals was in error in dismissing the appeal on the ground stated, we respectfully submit that the case should be remanded to that court for further disposition.

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Acting Solicitor General.
BRIEN MCMAHON,
Assistant Attorney General.
WILLIAM W. BARRON,
BATES BOOTH,
Special Assistants to the Attorney General.
W. MARVIN SMITH,
Attorney.

JANUARY 1938.

APPENDIX

STATUTES AND RULES INVOLVED

Act of February 24, 1933, as amended March 8, 1934 (U. S. C., Title 28, Sec. 723a):

> That the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, in the Supreme Courts of the District of Columbia, Hawaii, and Puerto Rico, in the United States Court for China, in the United States Circuit Courts of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States: *Provided,* That nothing herein contained shall be construed to give the Supreme Court the power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.
>
> SEC. 2. The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.
>
> SEC. 3. The Supreme Court may fix the dates when such rules shall take effect and

the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

Order of this Court of May 7, 1934, promulgating the Criminal Appeals Rules:

> Pursuant to the provisions of the Act of Congress, approved March 8, 1934, amending an Act entitled "An Act to give the Supreme Court of the United States authority to prescribe Rules of Practice and Procedure with respect to proceedings in criminal cases after verdict" (Act of February 24, 1933, c. 119, U. S. C., Title 28, Sec. 723 (a))—
>
> It is ordered on this seventh day of May, 1934, that the following rules be adopted as the Rules of Practice and Procedure in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilty by the trial court where a jury is waived, in criminal cases in District Courts of the United States and in the Supreme Court of the District of Columbia, and in all subsequent proceedings in such cases in the United States Circuit Court of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States.
>
> It is further ordered that these rules shall be applicable to proceedings in all cases in which a plea of guilty shall be entered or a verdict or finding of guilt shall be rendered, on or after the first day of September, 1934.

Rule II, paragraph 2, of the Criminal Appeals Rules:

> II. *Motions.* * * * (2). Save as provided in subdivision (3) of this Rule, motions in arrest of judgment, or for a new trial, shall be made within three (3) days after verdict or finding of guilt.

Rule III of the Criminal Appeals Rules:

III. *Appeals.* An appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made within the time specified in subdivision (2) of Rule II, the appeal may be taken within five (5) days after entry of the order denying the motion.

Petitions for allowance of appeal, and citations, in cases governed by these rules are abolished.

Appeals shall be taken by filing with the clerk of the trial court a notice, in duplicate, stating that the defendant appeals from the judgment, and by serving a copy of the notice upon the United States Attorney. The notice of appeal shall set forth the title of the case, the names and addresses of the appellant and appellant's attorney, a general statement of the nature of the offense, the date of the judgment, the sentence imposed, and, if the appellant is in custody, the prison where appellant is confined. The notice shall also contain a succinct statement of the grounds of appeal and shall follow substantially the form hereto annexed.

Rule XIII of the Criminal Appeals Rules:

In the foregoing rules, the phrase "trial court" shall be deemed to refer to the District Courts of the United States and the Supreme Court of the District of Columbia; the phrase "trial judge" includes the judge before whom the case was tried or brought to judgment and, in case of his absence from the district, or disability, or death, any other judge assigned to hold, or holding, the court in which the case was tried or brought to judgment; the phrase "appellate court" shall be deemed to refer to the

United States Circuit Court of Appeals and the Court of Appeals of the District of Columbia.

For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded.

Section 128 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (U. S. C., Title 28, Sec. 225a):

SEC. 128 (a). The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions— * * *

Second. In the United States district courts for Hawaii and for Porto Rico in all cases.

Section 8 (c) of the Act of February 13, 1925 (U. S. C., Title 18, Sec. 230):

SEC. 8 (c). No writ of error [15] or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

Organic Act for Hawaii (Act of April 30, 1900, as amended) as set forth, so far as pertinent, in U. S. C., Title 48, Secs. 641–645:

DISTRICT COURT

§ 641. District court; sessions; powers; terms. There shall be established in the Territory of Hawaii a district court, to con-

[15] Writs of error were abolished by the Act of Jan. 31, 1928, c. 14, 45 Stat. 54, as amended by the Act of April 26, 1928, c. 440, 45 Stat. 466 (U. S. C., Title 28, Secs. 861a, 861b).

sist of two judges, who shall reside therein and be called district judges, and who shall each receive an annual salary of $7,500. The two judges shall from time to time, either by order or rules of the court, prescribe at what times and in what classes of cases each of them shall preside.

The two judges may each hold separately and at the same time a session of the court (whether at the same or different terms of court, regular or special) and may preside alone over such session. The said two judges shall have the same powers in all matters coming before the court; and in case two sessions of the court are held at the same time, the judgments, orders, verdicts, and all proceedings of a session of the court, held by either of the judges, shall be as effective as if one session only were being held at a time.

Regular terms of said court shall be held at Honolulu on the second Monday in April and October, and special terms may be held at such times and places in said district as the said judges may deem expedient. (Apr. 30, 1900, c. 339, § 86, 31 Stat. 158; Mar. 3, 1909, c. 269, § 1, 35 Stat. 838; July 9, 1921, c. 42, § 313, 42 Stat. 119; Feb. 12, 1925, c. 220, 43 Stat. 890; Dec. 13, 1926, c. 6, § 1, 44 Stat. 919.)

§ 642. Jurisdiction of district court; authority of officers. The said court shall have the jurisdiction of district courts of the United States, and shall proceed therein in the same manner as a district court; and the said judges, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district courts of the United States. (Apr. 30, 1900, c. 339,

§ 86, 31 Stat. 158; Mar. 3, 1909, c. 269, § 1, 35 Stat. 838; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; July 9, 1921, c. 42, § 313, 42 Stat. 119.)

§ 643. Appointment and term of office of judges, district attorney, and mashal. The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint two district judges, a district attorney, and a marshal of the United States for the said district, all of whom shall be citizens of the Territory of Hawaii and shall have resided therein for at least three years next preceding their appointment. Said judges, attorney, and marshal shall hold office for six years unless sooner removed by the President. (Apr. 30, 1900, c. 339, § 86, 31 Stat. 158; Mar. 3, 1909, c. 269, § 1, 35 Stat. 838; July 9, 1921, c. 42, § 313, 42 Stat. 119.)

§ 644. Salaries of clerk and reporter; deputy clerk. A clerk of the district court shall be appointed as provided in section 6 of Title 28, JUDICIAL CODE AND JUDICIARY, at a salary to be fixed in accordance with section 558 of Title 28, JUDICIAL CODE AND JUDICIARY. The number and compensation of deputy clerks shall be fixed by the attorney general as in other judicial districts. The said district judges shall appoint a reporter of said court at a salary of $1,200 per annum. (Apr. 30, 1900, c. 339, § 86, 31 Stat. 158; Mar. 3, 1909, c. 269, § 1, 35 Stat. 838; Mar. 4, 1921, c. 161, § 1, 41 Stat. 1412; July 9, 1921, c. 42, § 313, 42 Stat. 119; June 1, 1922, c. 204, Title II, 42 Stat. 614, 616; Jan. 3, 1923, c. 21, Title II, 42 Stat. 1084.)

§ 645. Appeals. Appeals from the said district court shall be had and allowed to the circuit court of appeals for the ninth judicial

circuit in the same manner as appeals are allowed from district courts to circuit courts of appeal as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. (Apr. 30, 1900, c. 339, § 86, 31 Stat. 158; Mar. 3, 1909, c. 269, § 1, 35 Stat. 838; July 9, 1921, c. 42, § 313, 42 Stat. 119; Feb. 13, 1925, c. 229, § 1, 43 Stat. 936; Jan. 31, 1928, c. 14, § 1, 45 Stat. 54.)

U. S. GOVERNMENT PRINTING OFFICE: 1939.

SUPREME COURT OF THE UNITED STATES.

No. 319.—October Term, 1937.

Robert K. Mookini and Lee Sau Chong, Petitioners, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 28, 1938.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioners were convicted in the District Court of the Territory of Hawaii of violating Section 35 of the Criminal Code relating to fraudulent claims. 18 U. S. C. 80. The verdict was rendered on May 28, 1935; motions for a new trial were overruled on June 19, 1935; and petitioners were sentenced on June 29, 1935. Appeal was allowed by the District Court on September 27, 1935.

The Circuit Court of Appeals, finding that the appeal was not taken in the manner or within the time permitted by the Criminal Appeals Rules promulgated by this Court on May 7, 1934 (Rule III, 292 U. S. 662, 663), dismissed the appeal. 92 F. (2d) 126. In view of the importance of the question as to the application of the Criminal Appeals Rules to the District Court of the Territory of Hawaii, we granted certiorari. — U. S. —.

It is not questioned that the appeal to the Circuit Court of Appeals was allowed within the three months' period specified in Section 8 (c) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940; 28 U. S. C. 225, 230; 48 U. S. C. 645.

The Criminal Appeals Rules were promulgated pursuant to the Act of March , 1934, amending the Act of February 24, 1933. 28 U. S. C. 723a. The Act authorized this Court—

"to prescribe, from time to time, rules of practice and procedure with respect to any and all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases in District Courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone and Virgin Islands, in the Supreme Courts of the District of Co-

lumbia, Hawaii, and Puerto Rico, in the United States Court for China, in the United States Circuit Courts of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States".

In order to aid the Court in exercising its authority under the statute, the Attorney General of the United States at the request of the Court submitted on May 26, 1933, a draft of proposed rules. These were expressly limited to proceedings in cases brought in the District Courts of the United States and in the Supreme Court of the District of Columbia. The reason for this limitation was thus stated by the Attorney General:

"The Rules are limited in their application to proceedings in cases instituted in the District Courts of the United States and in the Supreme Court of the District of Columbia. There is not sufficient data at hand upon which to predicate proposals at this time relative to practice and procedure in cases instituted in the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, or in the Supreme Courts of Hawaii and Puerto Rico, or in the United States Court for China. It is thought that it would be the part of wisdom to establish the rules for practice and procedure for Continental United States before attempting to provide for the Territories, Insular Possessions and Consular Courts, as these situations will undoubtedly require special treatment because of local conditions and the distance separating the trial court from the Appellate Court".

In considering and revising the draft thus submitted, we approved this suggestion. The rules were accordingly limited to proceedings—

"in criminal cases in District Courts of the United States and in the Supreme Court of the District of Columbia, and in all subsequent proceedings in such cases in the United States Circuit Courts of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States". Order of May 7, 1934, 292 U. S. 661.

No provision was made with respect to proceedings in cases brought in the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone and Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, or in the United States Court for China. We entertain no doubt of our authority to limit the application of the new rules in this way. The statute empowered the Court to prescribe rules "from time to time" with respect "to any or all proceedings", after determination of guilt, in criminal cases in the

courts which were severally described. The statute contains no requirement that the Court must prescribe identical rules with respect to all the courts mentioned regardless of varying conditions, or that rules for all these courts must be prescribed at one and the same time. On the contrary, the manifest intention of the Congress was to permit the Court to exercise its discretion concerning the application of the rules.

The term "District Courts of the United States," as used in the rules, without an addition expressing a wider connotation, has its historic significance. It describes the constitutional courts created under Article III of the Constitution. Courts of the Territories are legislative courts, properly speaking, and are not District Courts of the United States. We have often held that vesting a territorial court with jurisdiction similar to that vested in the District Courts of the United States does not make it a "District Court of the United States". *Reynolds* v. *United States,* 98 U. S. 145, 154; *The City of Panama,* 101 U. S. 453, 460; *In re Mills,* 135 U. S. 263, 268; *McAllister* v. *United States,* 141 U. S. 174, 182, 183; *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 476, 477; *Summers* v. *United States,* 231 U. S. 92, 101, 102; *United States* v. *Burroughs,* 289 U. S. 159, 163. Not only did the promulgating order use the term District Courts of the United States in its historic and proper sense, but the omission of provision for the application of the rules to the territorial courts and other courts mentioned in the authorizing act clearly shows the limitation that was intended.

As the Criminal Appeals Rules were not made applicable to the District Court of the Territory of Hawaii, they did not supersede or alter the provisions of the Act of February 13, 1925, as to appeals from that court to the Circuit Court of Appeals. 28 U. S. C. 225, 230. The provision of the Organic Act of Hawaii (48 U. S. C. 645) to which the court below refers, that appeals from the District Court of the Territory to the Circuit Court of Appeals should be taken in the same manner as appeals from district courts, was always subject to modification in the discretion of the Congress which in its future legislation could make or authorize such distinctions in appellate procedure as appeared to be wise. The Act authorizing this Court to promulgate rules for criminal appeals, which should have the effect of legislation, necessarily modified the former statutory provisions so as to give the Court full authority to prescribe the time and manner of taking appeals and

to leave the Court free to determine to what courts, within the range of the authorization, its rules should apply. Pursuant to this authority, the Court has limited its rules so that they do not govern appeals from the District Court of the Territory of Hawaii and there is nothing in the earlier legislation which compels the extension of the rules beyond their intended and expressed application.

The judgment of the Circuit Court of Appeals is reversed and the cause is remanded to that court for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice CARDOZO took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.